No. 2911

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. W. CHAPMAN and P. R. THOMPSON, Copartners doing business under the firm name of CHAPMAN & THOMPSON,

Plaintiffs in Error,

vs.

JAVA PACIFIC LINE, a corporation, STOOMVAARTMAATSCHAPPY NEDERLAND, a corporation, ROTTERDAMSCHE LLOYD, a corporation, JAVA-CHINA-JAPAN LYN, a corporation, BLACK COMPANY, a corporation, and WHITE COMPANY, a corporation.

Defendants in Error.

BRIEF OF PLAINTIFFS IN ERROR

ALFRED J. HARWOOD,
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Attorneys for Plaintiffs in Error.

Filed this.....day of March, 1917.

FRANK D. MONCKTON, *Clerk.*

By.....
Deputy Clerk.

SCHWABACHER-FREY STATIONERY CO.,

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STATEMENT OF THE CASE

This is a writ of error to review a judgment of the Southern Division of the District Court of the United States in and for the Northern District of California, rendered against the plaintiffs in error who were plaintiffs in the trial court.

The action was commenced in the Superior Court of the State of California in and for the City and County of San Francisco, and was removed to the Federal court upon the ground of diversity of citizenship.

The action was tried by the court with a jury, and after evidence had been introduced by the respective parties, the court instructed the jury to return a verdict in favor of the defendants.

The action was to recover damages for breach of contract. In the complaint the plaintiffs alleged that a certain written contract was entered into between the plaintiffs and the defendants and that the defendants breached this contract by repudiating it. The contract relied upon is pleaded in paragraph IV of the complaint. It consisted of two letters, one written by the plaintiffs to the general agents of the defendants, and a reply thereto written by defendants' general agents to the plaintiffs.

The letter from plaintiffs to defendants is as follows:

"San Francisco, Jan. 27, 1916.

J. D. Spreckels & Bros. Co.,
Gen. Agts. Java Pacific Line,
60 California St., City.

Gentlemen:

Beg to acknowledge receipt of your letter of January 22nd confirming bookings for shipment from San Francisco during February, March and April and reservations for May and June.

We have shown opposite the tonnage booked for each month the rates which are to apply and we would appreciate it if you would confirm the same.

February shipment, 1110 weight tons, rate $8.00 per ton of 2000 lbs. for bar iron under 30 feet in length, plate iron and structural steel, no piece to exceed 4000 lbs. in weight, $10.00 per ton of 2000 lbs. to Hong Kong and Manila.

March shipment, 1000 weight tons, rate $10.00 per ton of 2000 lbs. for bar iron under 30 feet in length, plate iron and structural steel, no piece to exceed 4000 lbs. in weight, $12.00 per ton of 2000 lbs. to Hong Kong and Manila.

April shipment, 1000 weight tons, rate $25.00 per ton of 2000 lbs. for bar iron under 30 feet in length, plate iron and structural steel, no piece to exceed 4000 lbs. in weight, $30.00 per ton of 2000 lbs. to Hong Kong and Manila.

May shipment, 1000 weight tons, rate to Hong Kong and Manila to be quoted about February 20th.

June shipment, 1000 weight tons, rate to Hong Kong and Manila, to be quoted about March 20th.

The above rates apply from ship's tackle, San Francisco, to ship's tackle, destination.

We would ask that you confirm above bookings, reservations and rates so as to complete our records.

Yours very truly,

Chapman & Thompson,

By J. W. Chapman."

(Record p. 3.)

The letter from defendants to plaintiffs is as follows:

"*Java-Pacific Line*

J. D. Spreckels & Bros. Company
General Agents
San Francisco, Cal., Feb. 12, 1916.

Messrs. Chapman & Thompson,
Fife Bldg.,
San Francisco.

Gentlemen:

Referring to your letter of January 27th, detailing the space which you have booked or reserved with us for the next few months.

We confirm what you have written, except that in the month of March we have on our books reserved for you 300 tons weight for iron bars, plate iron, and structural steel.

We have noted against this item on our record, space to be increased if it is possible for us to accommodate any more of your freight on that steamer.

The freight rates mentioned in your letter are also hereby confirmed.

Yours very truly,

J. D. Spreckels & Bros. Company,
Fred F. Connor,
Traffic Manager."
(Record p. 4.)

It was further alleged in Paragraph IV of the complaint that upon the receipt by plaintiffs of the letter last quoted, the plaintiffs notified the defendants that the reservation of 300 tons for the month of March was satisfactory. (Record p. 5.)

It will be noted that these two letters formed a contract under the terms of which the defendants agreed to reserve for plaintiffs certain space for cer-

tain commodities to be shipped in the steamers of defendants to Hong Kong or Manila, sailing in the months of February, March, April, May and June, 1916. With reference to the reservations for February, March and April the letters constitute a complete contract.

By Paragraph VI of the complaint it is alleged that on February 25, 1916, plaintiffs wrote to defendants a letter requesting the defendants to modify certain of the terms of the contract evidenced by the two letters of January 27, 1916, and February 12, 1916. (Record pp. 5-6.)

In Paragraph VII of the complaint, it is alleged that on February 26, 1916, the defendants repudiated the contract between plaintiffs and defendants evidenced by said letters of January 27th, 1916, and February 12, 1916, and notified plaintiffs that defendants would not further perform said contract. It was further alleged that said repudiation was contained in the following letter written by defendants to plaintiffs:

"*Java-Pacific Line*

J. D. Spreckels & Bros. Company
General Agents
San Francisco, Cal., Feb. 26, 1916.

Messrs. Chapman & Thompson,
Fife Building,
San Francisco.

Gentlemen:—

Referring to your letter of February 25th, handed us yesterday afternoon by a Mr. Wheaton, which requests us to change a booking in your favor for the month of April.

In going over our record of the bookings for

March and April, we find that the steamers have been overbooked, and we are therefore obliged to say we will be unable to accept any freight from you on our March and April steamers.

We wish also to advise you that for similar reasons we have decided to cancel any reservations you have made on subsequent steamers.

Yours very truly,

J. D. Spreckels & Bros. Company,
General Agents,
Fred F. Connor,
Traffic Manager."
(Record p. 7)

The complaint further alleged (Paragraph VIII) that plaintiffs were damaged in the sum of $37,000 by said breach of said contract by defendants.

By their answer the defendants admitted that the letter of January 27th was written by plaintiffs and received by defendants, and that the letter of February 12th was written by defendants and received by plaintiffs. The answer also admitted that upon the receipt by plaintiffs of the letter of February 12th, plaintiffs notified defendants that the reservation of 300 tons for the month of March was satisfactory.

The answer also admitted the repudiation of the agreement evidenced by the two letters of January 27th and February 12th.

The answer also alleged (subdivision 1 to 5, both inclusive, of Paragraph I Record pp. 19-21) that there were various communications (whether oral or written is not averred) between the plaintiffs and the defendants, which preceded the letters of January 27th and February 12th, pleaded in Paragraph IV of the complaint.

The purport of these allegations of the answer was, that prior to January 27th, the date of the letter from plaintiffs to defendants, the plaintiffs represented themselves as agents of Pacific Coast Steel Company and that prior to that date the plaintiffs, as such agents of Pacific Coast Steel Company, reserved for the account of the Steel Company certain space in the steamers of the defendants sailing in the months of February, March, April, May and June, 1916.

The answer then alleges (subdivision 5 of Paragraph I (p. 21 of Record) that prior to January 27, 1916, the plaintiff, J. W. Chapman, requested defendants to hand him a memorandum of the reservations made by plaintiffs, with which request the defendants complied.

The answer then alleges: (Record p. 21)

> "That thereupon the said plaintiffs wrote the letter set forth in the complaint under date of January 27, 1916; that understanding said letter to be part and parcel of said transactions and correspondence preceding, and not otherwise, and were part and parcel of the said contracts, and not otherwise, and they then and there were at all times understood to be part and parcel of said contracts between said defendants and the Pacific Coast Steel Company, and not otherwise."

The plaintiffs demurred to the part of the answer alleging said "transactions and correspondence preceding" and to the part thereof alleging that the defendants understood said letter of January 27, to be "part and parcel of said transactions and correspondence preceding" upon the ground that said parts of said answer did not constitute a defense to the action. This demurrer was overruled by the court. (pp. 29-30 Record.)

At the trial of the action the plaintiffs introduced testimony to show the damages which they had sustained. (pp. 39-78 Record.) This testimony was to the effect that the prevailing rate on February 26 (the date of the repudiation) for transportation of bar iron by steamer from San Francisco to Hong Kong or Manila was from $40 to $50 per ton. Testimony was also introduced that the prevailing rate on February 26th for April shipment was the same. Under the contract between the parties the defendants undertook to transport 300 tons of bar iron in March for $10 per ton and 1000 tons in April for $25 per ton.

When the plaintiffs rested the defendants offered in evidence various letters written by the plaintiffs to the defendants and by the defendants to the plaintiffs, prior to January 27, 1916. (Exhibits "A", p. 79 Record; "B", p. 81; "C", p. 82; "D", p. 84; "F", p. 88; "I", p. 94; "J", p. 95; "K", p. 96; "L", p. 97; "M", p. 99, and "N", p. 100.) These letters were offered in evidence in pursuance of the allegations contained in subdivisions 1 to 7 of Paragraph I of the answer.

The plaintiffs objected to the introduction in evidence of these letters upon the ground that they were immaterial, irrelevant and incompetent; that they related to prior negotiations or transactions which were merged in the written contract pleaded in the complaint and that they were inadmissible under the rule of substantive law that extrinsic or parol evidence should not be permitted to vary the terms of the contract between the parties formed by the two letters of January 27 and February 12th, pleaded in the complaint.

In every instance the court overruled the plaintiffs' objections and admitted the letters in evidence. The avowed purpose of the defendants in offering these letters in evidence was to show that under the contract pleaded in the complaint the space agreed to be reserved for the plaintiffs herein was intended to be reserved for the Pacific Coast Steel Company.

When defendants rested the plaintiffs thereupon offered in evidence, in rebuttal, a letter written by the defendants to the plaintiffs under date of January 22, 1916. (Record, p. 115). The plaintiffs also introduced certain oral testimony in rebuttal.

When the evidence was all in the court, at the request of the defendants, instructed the jury to find a verdict for the defendants.

On this writ of error the plaintiffs in error maintain that the trial court erred in the following particulars:

1. In overruling plaintiffs' demurrer to subdivisions 1 to 7, both inclusive, of Paragraph I of the Answer.
2. In admitting in evidence the letters written by the plaintiffs to the defendants, and by the defendants to the plaintiffs, prior to January 27th, 1916.
3. In instructing the jury to find a verdict in favor of the defendants.
4. In admitting in evidence letters written by the parties subsequently to February 12, 1916; in admitting in evidence letters written by Pacific Coast Steel Company; in

admitting in evidence letters written by the attorneys of the parties; and in rulings on the admission of certain oral testimony.

Under the next head, in pursuance of the rule of this court, the plaintiffs in error set out separately and particularly each error asserted and intended to be urged.

SPECIFICATIONS OF ERROR

1. The court erred in overruling plaintiffs' demurrer to that part of defendants' answer contained in subdivisions 1 to 7, both inclusive, of Paragraph I thereof. Said part of said answer is set forth at pages 19 to 22 of the Record; the said demurrer of plaintiffs is set forth at page 29 of the Record, and the order overruling said demurrer is set forth at page 30 of the Record. By said demurrer plaintiffs objected that the matters therein referred to did not constitute a defense to the action.

2. The court erred in admitting in evidence, over plaintiffs' objection, the letter dated December 2, 1915, from defendants to plaintiffs. A copy of said letter is printed at page 79 of the Record. Said objection was made upon the ground that said letter was irrelevant, incompetent and immaterial, and that its admission in evidence attempted to vary the written contract between the parties, and upon the further ground that it was merged in the final contract set forth in the complaint.

3. The court erred in overruling plaintiffs' objection to the admission in evidence of the letter from J. W. Chapman to the defendants, dated December 3, 1915. A copy of said letter is printed at page 81 of the Record. Said objection was made upon the ground that said letter was irrelevant, incompetent and immaterial and an attempt to vary by parol or extrinsic evidence the contract formed by the two letters set forth in the complaint.

4. The court erred in overruling plaintiffs' objection to the admission in evidence of the letter of J. W. Chapman to J. D. Spreckels & Bros. Co., dated December 9, 1915. A copy of said letter is printed at page 82 of the Record. Said objection was made upon the ground that

said letter was irrelevant, incompetent and immaterial, and an attempt to vary by parol or extrinsic evidence the contract formed by the two letters set forth in the complaint.

5. The court erred in overruling plaintiffs' objection to the admission in evidence of letter from J. D. Spreckels & Bros. Co. to J. W. Chapman, dated December 10, 1915. A copy of said letter is printed at page 84 of the Record. Said objection was made upon the ground that said letter was irrelevant, incompetent and immaterial, and an attempt to vary by parol or extrinsic evidence the contract formed by the two letters set forth in the complaint.

6. The court erred in overruling plaintiffs' objection to the admission in evidence of the letter dated January 28, 1916, from Pacific Coast Steel Company to J. D. Spreckels & Bros. Co. A copy of said letter is printed at page 86 of the Record. Said objection was made upon the ground that said letter was irrelevant, incompetent and immaterial, and an attempt to vary by parol or extrinsic evidence the written contract formed by the two letters set forth in the complaint, and upon the further ground that it was correspondence between one of the parties to this action and another party who is not a party to this action.

7. The court erred in admitting in evidence a letter dated December 4, 1915, from J. W. Chapman to J. D. Spreckels & Bros. Co. A copy of said letter is printed at page 88 of the Record. Said objection was made upon the ground that the said letter was irrelevant, incompetent and immaterial and an attempt to vary by parol or extrinsic evidence the terms of the written contract set forth in the complaint.

8. The court erred in overruling plaintiffs' objection to the introduction in evidence of letter dated March 3, 1916, from Pacific Coast Steel

Company to J. D. Spreckels & Bros. Co. A copy of said letter is printed at page 90 of the Record. Said objection was made upon the ground that said letter was irrelevant, incompetent and immaterial, and an attempt to vary by parol or extrinsic evidence the written contract set forth in the complaint, and upon the further ground that it was not a part of the correspondence between the parties to this action, and upon the further ground that it was a letter written after the breach of contract counted upon in the complaint.

9. The court erred in overruling plaintiffs' objection to the admission in evidence of notice from plaintiffs to defendants, dated March 14, 1916. A copy of said notice is printed at page 92 of the Record. Said objection was made upon the ground that said notice is immaterial, irrelevant and incompetent and an attempt to vary by parol or extrinsic evidence the contents of the contract set forth in the complaint, and upon the further ground that it was sent after the breach of contract counted upon and after the complaint herein was filed.

10. The court erred in overruling plaintiffs' objection to letter dated December 24, 1915, from J. W. Chapman to J. D. Spreckels & Bros. Co. A copy of said letter is printed at page 94 of the Record. Said objection was made upon the ground that said letter is irrelevant, incompetent and immaterial, and an attempt to vary by parol or extrinsic evidence the contract set forth in the complaint.

11. The court erred in overruling plaintiffs' objection to letter dated December 24, 1915, of J. W. Chapman to J. D. Spreckels & Bros. Co. A copy of said letter is printed at page 95 of the Record. Said objection was made upon the ground that said letter is irrelevant, incompe-

tent and immaterial, and an attempt to vary by parol or extrinsic evidence the contract set forth in the complaint.

12. The court erred in overruling plaintiffs' objection to letter dated December 30, 1915, from plaintiffs to J. D. Spreckels & Bros. Co. A copy of said letter is printed at page 96 of the Record. Said objection was made upon the ground that said letter is irrelevant, incompetent and immaterial, and an attempt to vary by parol or extrinsic evidence the contract set forth in the complaint.

13. The court erred in overruling plaintiffs' objection to letter dated December 24, 1915, from J. W. Chapman to J. D. Spreckels & Bros. Co. A copy of said letter is printed at page 97 of the Record. Said objection was made upon the ground that said letter is irrelevant, incompetent and immaterial, and an attempt to vary by parol or extrinsic evidence the contract set forth in the complaint.

14. The court erred in overruling plaintiffs' objection to letter dated December 30, 1915, from plaintiffs to J. D. Spreckels & Bros. Co. A copy of said letter is printed at page 99 of the Record. Said objection was made upon the ground that said letter was irrelevant, incompetent and immaterial, and an attempt to vary by parol or extrinsic evidence the contract set forth in the complaint.

15. The court erred in overruling plaintiffs' objection of the introduction in evidence of the letter of January 10, 1916, from plaintiffs to J. D. Spreckels & Bros. Co. A copy of said letter is printed at page 100 of the Record. Said objection was made upon the ground that said letter was irrelevant, incompetent and immaterial, and an attempt to vary by parol or extrinsic evidence the contract set forth in the complaint.

16. The court erred in overruling plaintiffs' objection to letter from J. D. Spreckels & Bros. Co. to plaintiffs dated February 29, 1916. A copy of said letter is printed at page 103 of the Record. Said objection was made upon the ground that said letter was irrelevant, incompetent and immaterial, and a self serving declaration.

17. The court erred in overruling plaintiffs' objection to letter from Alfred J. Harwood to J. D. Spreckels & Bros. Co., dated February 28, 1916. A copy of said letter is printed at page 106 of the Record. Said objection was made upon the ground that said letter was irrelevant, incompetent and immaterial, and written after the breach of the contract, and in relation to a compromise or adjustment between the parties.

18. The court erred in overruling plaintiffs' objection to letter from Nathan H. Frank to Alfred J. Harwood, dated February 29, 1916. A copy of said letter is printed at page 109 of the Record. Said objection was made upon the ground that said letter was irrelevant, incompetent and immaterial, written after the breach of contract, and in relation to a compromise or adjustment between the parties.

19. The court erred in overruling plaintiffs' objection to letter from Alfred J. Harwood to Nathan H. Frank, dated March 1, 1916. A copy of said letter is printed at page 110 of the Record. Said objection was made upon the ground that said letter was irrelevant, incompetent and immaterial, and written after the breach of contract, and in relation to a compromise or adjustment between the parties.

20. The court erred in overruling plaintiffs' objection to letter from Nathan H. Frank to Alfred J. Harwood, dated March 2, 1916. A copy of said letter is printed at page 113 of the Record. Said objection was made upon the

ground that said letter was irrelevant, incompetent and immaterial, written after the breach of contract, and in relation to a compromise or adjustment between the parties.

21. The court erred in overruling plaintiffs' objection to the following question asked the witness F. F. Connor: "Do you know whether or not the 300 tons of iron mentioned in the correspondence here and which in the letter of March 3, 1915, Defendant's Exhibit 'G', is spoken of by the Pacific Coast Steel Company as 400 tons of bar steel booked for their account by Chapman & Thompson was actually received from the Pacific Coast Steel Company and transported in accordance with the terms of this correspondence?" Said testimony is printed at page 114 of the Record. Said objection was made upon the ground that said question was irrelevant, incompetent and immaterial, as to whether or not some third person shipped freight with the defendants in this case, and upon the further ground that the question called for the conclusion of the witness whether the shipment of the 300 tons was made in pursuance of a certain contract or not.

22. The court erred in overruling plaintiffs' objection to the following question asked the witness J. W. Chapman: "As a matter of fact, Mr. Chapman, you personally had no freight at all to ship?" Said testimony appears at page 122 of the Record. Said objection was made upon the ground that said question was immaterial, irrelevant and incompetent.

23. The court erred in overruling plaintiffs' objection to the following questions asked the witness J. W. Chapman: "Then that of March stood exactly in the same place, in the same situation as the April shipment stands to-day, did it not, at that time?" and "So far as confirmation is concerned, and so far as any advice from you

to the Java-Pacific line is concerned, that it was for the Pacific Coast Steel Company and not for you, I mean?" Said testimonv is printed at page 128 of the Record. Said objection was made upon the ground that said questions were irrelevant, incompetent and immaterial.

24. The court erred in overruling plaintiffs' objection to the following question asked the witness J. W. Chapman: "Those are the two letters which form the basis of the second item here, March shipment, 1000 weight tons, rate $10, per ton of 2000 pounds for bar iron under 30 feet in length, plate iron and structural steel, no piece to exceed 4000 pounds in weight, $12 per ton of 2000 pounds to Hong Kong and Manila, as qualified by the reply which you have put in evidence, in which, among other things, the Java Pacific Line say, 'We confirm what you have written, except that in the month of March we have on our books reserved for you 300 tons weight for iron bars, plate iron and structural steel.' Is that not so?" Said testimony is printed at page 132 of the Record. Said objection was made upon the ground that the letter refers to bar iron 20 feet and under in length, whereas the final contract refers to bar iron 30 feet and under in length, and also refers to structural steel which was not mentioned in said letter, and upon the further ground that said question called for conclusion of the witness.

25. The court erred in overruling plaintiffs' objection to the following question asked the witness J. W. Chapman: "At any rate, your statement in your letter of January 27th, concerning the March shipment was based, was it not, upon the agreement contained in the letter of December 24th, which I have exhibited to you?" Said testimony is printed at page 133 of the Record. Said objection was made upon the ground that said question was immaterial,

incompetent and irrelevant, and called for the conclusion of the witness.

26. The court erred in overruling plaintiffs' objection to the following question asked the witness J. W. Chapman: "You did not consider it necessary; subsequently, however, after this controversy arose, you went down to the Pacific Coast Steel Company, did you not, to get them to disaffirm your agency for them?" Said testimony is printed at page 137 of the Record. Said objection was made upon the ground that said question was immaterial, incompetent and irrelevant.

27. The court erred in overruling plaintiffs' objection to the following question asked the witness F. F. Connor: "What was the character of Mr. Edwards' authority in the office there?" Said testimony is printed at page 140 of the Record. Said objection was made upon the ground that said question called for the conclusion of the witness.

28. The court erred in denying plaintiffs' motion to strike out the following answer given by the witness F. F. Connor: "He had no authority whatever. He was an employee." Said testimony is printed at page 141 of the Record. Said motion so denied was made upon the ground that said answer was the conclusion of the witness.

29. The court erred in overruling plaintiffs' objection to the question asked the witness F. F. Connor: "You have heard Mr. Chapman's testimony to the effect that Mr. Edwards was in Chapman's office in the Fife Building when Mr. Chapman testified that he told Mr. Edwards that these bookings were for Chapman & Thompson. Did Mr. Edwards ever report that to you?" Said testimony is printed at page 141 of the Record. Said objection was made upon the ground that

said question was irrelevant, incompetent and immaterial.

30. The court erred in overruling plaintiffs' objection to the following question asked the witness F. F. Connor: "Did you ever hear of it before?" Said testimony appears at page 141 of the Record. Said objection was made upon the ground that said question was irrelevant, incompetent and immaterial.

31. The court erred in instructing the jury to find a verdict for the defendant. The said instruction of the court is printed at page 145 of the Record. The court so erred for the reason that the evidence introduced at the trial of the action tended to support all the material allegations of the complaint.

32. The jury erred in returning a verdict in favor of the defendants. Said verdict of said jury is printed at page 146 of the Record.

33. The court erred in entering judgment in favor of the defendant in pursuance of said verdict. Said judgment appears at page 32 of the Record.

BRIEF OF THE ARGUMENT

The following are the reasons why the judgment of the trial court should be reversed:

1. The order of the court overruling plaintiffs' demurrer to subdivisions 1 to 7, both inclusive, of Paragraph I of defendants' demurrer was erroneous because said part of said answer alleged certain communications between the parties to the contract which were merged in said contract and could not be permitted to vary its terms.

2. The action of the court in overruling plaintiffs' objections to the introduction in evidence of various letters written by the parties prior to January 27, 1916, was erroneous, as said letters were inadmissible for the purpose of changing the legal effect of the contract formed by the letters of January 27, 1916, and February 12, 1916, pleaded in the complaint.

3. The court erred in instructing the jury to find a verdict in favor of the defendants. This instruction was given upon the theory that the contract pleaded in the complaint was not a contract between the plaintiffs and the defendants, but a contract between the defendants and Pacific Coast Steel Company. This theory was erroneous for the reason that the letters referred to above could not be permitted to vary the terms or legal effect of the contract pleaded in the complaint.

These reasons stated above involve practically the same question. In the first case the question arose in considering the validity of the defendants' answer; in the second case it arose when the defendants sought to introduce evidence in support of the allegations of their answer; and in the third case it arose as a question of the legal effect of such

evidence. In all three cases the question is one of substantive law.

The plaintiffs wrote to defendants a letter stating the terms of an agreement between them in which letter they asked the defendants to confirm the terms of such agreement. In reply to this letter the defendants wrote confirming the agreement. These two letters on their face constitute a complete contract between the parties.

In their answer (subdivisions 1 to 7, both inclusive, of Paragraph I, Record pp. 19-21) the defendants set forth various communications between the parties which preceded the two letters of January 27th and February 12th forming a complete contract. The purpose of this was to show that the space on defendants' steamers mentioned in the two letters forming the contract was reserved for the account of Pacific Coast Steel Company and not for the account of the plaintiffs.

The letters which the court admitted in evidence were admitted for the same purpose.

And in instructing the jury to find a verdict for the defendants, the court in effect ruled that it was legal for the defendants to show that the space was reserved for Pacific Coast Steel Company and not for the plaintiffs, and that the defendants had established by conclusive evidence that such was the intent of the parties.

It will be convenient, therefore, to consolidate the argument in support of these three reasons, and we will adopt this method in presenting the case.

Allegations of Answer

The defendants' answer admitted that the two letters of January 27th and February 12th were written as alleged in the complaint. It also admitted that the defendants wrote the letter of February 26th, 1916, repudiating the contract evidenced by the letters of January 27th and February 12th.

The answer also contained the following allegations:

> "1. That on the 2nd day of December, 1915, the said plaintiffs, then and there representing to said defendants that they were acting for and on behalf and on account of the Pacific Coast Steel Company, a corporation, booked with said defendants for account of said Pacific Coast Steel Company, space for 360 tons of steel, destined to Hong Kong, to be shipped on the steamer 'Arakan', scheduled to sail from San Francisco on or about February 19, 1916; and at the same time, and as part of the same transaction, secured an option for said Pacific Coast Steel Company to ship an aggregate of 750 tons destined to Hong Kong, Manila and Java ports of call, which said option was to expire one week from November 27, 1915. That thereafter, to wit, on the 3rd day of December, 1915, said plaintiffs confirmed the booking of said 360 tons of steel bars for account of said Pacific Coast Steel Company, and also confirmed the said option for 750 tons of bar steel for account of said Pacific Coast Steel Company; and that thereafter, to wit, on the 28th day of January, 1916, the said booking of 1110 tons of bar iron and steel to be shipped on said steamer 'Arakan' to sail February 19, 1916, was duly confirmed by said Pacific Coast Steel Company.
>
> That said 1110 tons of bar iron was thereafter, to wit, during the month of February,

1916, received on board of said steamer 'Arakan' from said Pacific Coast Steel Company, and transported to Hong Kong and Manila in pursuance of said contract with said Pacific Coast Steel Company, and not otherwise, and said defendants deny that said cargo was shipped under or in pursuance of any other or different contract, or that said letters in said complaint set forth and dated January 27, 1916, and February 12, 1916, constituted the contract under which said or any freight was shipped.

2. That thereafter, on the 24th day of December, 1915, the said plaintiffs, then and there representing themselves to be acting as agents for and on account of the Pacific Coast Steel Company, booked with said defendants for account of said Pacific Coast Steel Company, 300 tons of bar steel, to be shipped on the steamer 'Tjisondari', which said contract was thereafter confirmed by said Pacific Coast Steel Company.

That thereafter, during the month of March, 1916, at the request of said Pacific Coast Steel Company, and in pursuance of and fulfillment of said contract last above mentioned, said defendants received on board said steamer from said Pacific Coast Steel Company, the said 300 tons of bar steel, and transported it as in said agreement of December 24th provided.

3. That on December 30, 1915, the said plaintiffs then and there representing themselves to be acting as agents for and on account of the Pacific Coast Steel Company, booked for account of said Pacific Coast Steel Company space for 1,000 tons of bar iron, for shipment from San Francisco to Hong Kong and Manila on the steamer "Karimoen", scheduled to sail April 22, 1916.

4. That on January 10, 1916, the said plaintiffs then and there representing themselves to be acting as agents for and on account of the

said Pacific Coast Steel Company, booked space for account of said Pacific Coast Steel Company for 1,000 tons of bar steel for shipment from San Francisco to Hong Kong or Manila on the steamer "Tjikebang", to sail about May 22, 1916.

5. That thereafter said J. W. Chapman requested the defendants to hand him a memorandum of the reservations so made by plaintiffs as aforesaid, with which request said defendants complied. That thereupon the said plaintiffs wrote the letter set forth in the complaint under date of January 27, 1916; that understanding said letter to be part and parcel of said transactions and correspondence preceding, and not otherwise, and they then and there were part and parcel of the said contracts, and not otherwise, and were at all times understood to be part and parcel of contracts between said defendants and the Pacific Coast Steel Company, and not otherwise."

(Record pp. 19-21.)

The foregoing are subdivisions 1 to 5, both inclusive, of Paragraph I of the answer. Subdivision 6 is as follows:

"6. That the said Pacific Coast Steel Company thereafter disaffirmed the said contract of December 30, 1915, for space for 1000 tons of bar iron to be shipped on the steamer "Karimoen" during the month of April, 1916, and also disaffirmed the said contract of January 10, 1916, for 1000 tons of bar steel for shipment on the steamer "Tjikebang", to sail about May 22, 1916, and then and there informed said defendants that the said plaintiffs were not authorized to enter into the said contracts for or on account of said Pacific Coast Steel Company and notwithstanding that the defendants were able, ready and willing to receive the cargo of said

> Pacific Coast Steel Company on board of said vessel and to transport it in accordance with the terms of said contracts, the said Pacific Coast Steel Company declined to ship any cargo thereunder."
>
> (Record p. 22.)

By subdivision 7 (Record p. 22) it is alleged that defendants declined to comply with the request for a modification of the contract contained in the letter dated February 25th, 1916, from plaintiffs to defendants, set forth in Paragraph VI of the Complaint. Said subdivision 7 further alleged that following the letter of repudiation dated February 26th, 1916, set forth in Paragraph VII of the complaint, the defendants wrote another letter to plaintiffs under date of February 29, 1916, attempting to explain the reason for the repudiation. This second letter is set forth in said subdivision 7 of Paragraph I of the answer.

We are here mainly concerned with the allegations of subdivisions 1 to 5, both inclusive, of Paragraph I of the answer quoted above.

Subdivision 1 alleges that on the 2nd and 3rd days of December, the plaintiffs acting on behalf of Pacific Coast Steel Company booked "for account of Pacific Coast Steel Company" space for 1110 tons of steel, to be shipped on steamer "Arakan", to sail February 19, 1916; that this booking was confirmed by the Pacific Coast Steel Company; and that the steel was received on board the steamer "Arakan" and transported to Hong Kong and Manila "in pursuance of said contract." By said subdivision 1 it is "denied that said cargo was shipped in pursuance of any other or different contract, or that said letters in said complaint set forth and dated January 27, 1916, and

February 12, 1916, constituted the contract under which said or any freight was shipped."

Now it is really immaterial here under what contract this 1110 tons of steel was shipped. The complaint admits that the contract was performed insofar as the 1110 tons are concerned. But right here appears the fundamental error which underlies defendants' theory of this case.

The plaintiffs allege a written contract for the transportation for them of 1110 tons of certain commodities on the steamer of defendants sailing in February, 1916. This contract consists of two letters dated January 27th and February 12th, respectively. The defendants do not deny this contract, but allege that on December 2nd and December 3rd, 1915, another and different contract was entered into. It is not even alleged that this other and different contract was in writing. It is alleged that this other and different contract was performed by the defendants.

Now it is obvious that the contract alleged in subdivision 1 was either superseded by the contract evidenced by the letters of January 27th and February 12th, or it was not superseded thereby. If it was not superseded by the contract evidenced by these two letters, then both contracts were in force. The error into which counsel for defendants have fallen is also shown by the denial "that said letters in said complaint set forth and dated January 27, 1916, and February 12, 1916, constituted the contract under which said or any freight was shipped."

That these two letters constituted a contract is a matter of law. The plaintiffs have conceded that this contract was performed by the defendants inso-

far as the February space is concerned. Defendants have alleged, in effect, that they did not even perform it to this extent.

Subdivision 2 alleges that on December 24, 1915 "the plaintiffs, representing themselves to be acting as agents for and on account of Pacific Coast Steel Company, booked with said defendants for account of Pacific Coast Steel Company (space for) 300 tons of bar steel to be shipped on the steamer 'Tjisondari', which said contract was thereafter confirmed by said Pacific Coast Steel Company". It is further alleged that in the month of March, this amount of steel was received on board said steamer from Pacific Coast Steel Company and "transported as in said agreement of December 24th provided."

It is not alleged that the "agreement of December 24th" was in writing. The defendants do not deny that they entered into the contract constituted by the two letters of January 27th and February 12th, but allege that on December 24, 1915, they entered the two letters of January 27th and February 12, into an "agreement" with Pacific Coast Steel Company to transport for that company 300 tons of bar steel, and that they performed this agreement.

If the "agreement of December 24th" related to the same subject matter as the contract evidenced by the two letters of January 27th and February 12th, it is obvious that the "agreement of December 24th" was superseded by the contract evidenced by these two letters. If it was not so superseded then both the "agreement of December 24th" and the contract evidenced by these two letters were in force. If the

"agreement of December 24th" was in parol (as presumably it was, the answer not alleging that it was in writing) then it was merged in the contract evidenced by the letters of January 27th and February 12th, provided it related to the same subject matter. If it did not relate to the same subject matter, it remained in force as an agreement resting in parol. In such case there were two agreements, one made on December 24th, which rested in parol, and one in writing evidenced by the two letters pleaded in the complaint.

Subdivision 3 alleges that "on December 30, 1915, the plaintiffs then and there representing themselves to be acting as agents for and on account of Pacific Coast Steel Company, booked for account of Pacific Coast Steel Company, space for 1000 tons of bar iron, for shipment from San Francisco to Hong Kong and Manila, on the steamer 'Karimoen' scheduled to sail April 22, 1916."

The statements above made with reference to the "agreement of December 24th" apply also to the "agreement of December 30th."

Subdivision 4 alleges: "On January 10, 1916, the said plaintiffs, representing themselves to be acting as agents and for account of Pacific Coast Steel Company, booked space for account of said Pacific Coast Steel Company for 1000 tons of bar steel for shipment from San Francisco to Hong Kong or Manila, on the steamer 'Tjikebang' to sail about May 22, 1916."

The argument made above with reference to the

"agreement of December 24th" applies also with reference to this agreement alleged to have been made on January 10th, 1916.

In this case, we are not concerned with the part of the contract evidenced by the two letters of January 27th and February 12th, referring to space for May shipment. The letters did not constitute a complete agreement with reference to space for May as the rate was not agreed upon. The plaintiffs made no claim for damages for the repudiation of this part of the contract.

Subdivision 5 alleges that thereafter (after January 10, 1916) one of the plaintiffs requested the defendants to hand him a memorandum of the reservations so made by plaintiffs, as aforesaid, with which said request said defendants complied. Then follows the following remarkable allegation:

> "That thereupon the said plaintiffs wrote the letter set forth in the complaint under date of January 27, 1916; that understanding said letter to be part and parcel of said transactions and correspondence preceding, and not otherwise, and were part and parcel of the said contracts, and not otherwise, and they then and there were at all times understood to be part and parcel of said contracts between said defendants and the Pacific Coast Steel Company, and not otherwise. (Record p. 21.)

It will be seen that by this subdivision of the answer it is alleged that the letter of January 27th, set forth in the complaint was "understood to be a part and parcel of said transactions and correspondence preceding" and that said letter of January 27th

"is a part and parcel of said contracts between said defendants and the Pacific Coast Steel Company." The pleader probably intended the allegation to be that the letter of February 12th was also "a part and parcel" of "said transactions and correspondence preceding" and of said contracts with Pacific Coast Steel Company, as the pronoun "they" is used when the letter of January 27th is referred to the second time.

The gist of these allegations is that the letters of January 27th and February 12th, set forth in Paragraph IV of the Complaint "were part and parcel" of the "transactions and correspondence" alleged in subdivision 1 to 4 inclusive of Paragraph I of the answer.

In other words defendants allege (subdivision 5) *the legal conclusion that two letters, which on their face constitute a written contract between the parties, are not a contract between the parties at all, but are merely a "part and parcel" of the prior oral contracts alleged in subdivisions 1 to 4 of Paragraph I.*

The defendants have turned things upside down. The situation is the same as if on the first of the month A agreed thereafter to sell and B agreed thereafter to buy certain personal property at a certain price, and on the tenth of the month entered into another agreement whereby A agreed thereafter to sell and B agreed thereafter to buy additional personal property at a certain price, and on the 25th of the month entered into a written agreement relating to the purchase and sale of the property covered by the prior agreements of the first and tenth.

Now it is clear that the agreement made on the 25th is not "part and parcel" of the two prior agreements, whether the prior agreements were oral or written. The agreement made on the 25th is *the* agreement between the parties. The prior agreements whether oral or written insofar as they related to the same subject matter were merged therein. They may be resorted to for the purpose of explaining an ambiguity in the later agreement but for no other purpose.

Defendants have alleged the conclusion of law that prior transactions are not merged in a subsequent written contract, but that the subsequent written contract is but a "part and parcel" of the prior transactions, and that in order to ascertain *its terms* the terms of the prior transactions should be resorted to.

An inspection of the two letters set forth in paragraph IV of the Complaint will show that *as a matter of law, they constitute a contract between the parties.* The allegation that this contract is "part and parcel" of prior transactions is not only not an allegation of fact but is an erroneous conclusion of law.

We will now assume for the sake of the argument, that by these allegations of the answer it was intended to aver that in entering into the contract evidenced by the letters of January 27th and February 12th, the plaintiffs and defendants intended that the contract evidenced thereby should inure to the benefit of Pacific Coast Steel Company, and that the Pacific Coast Steel Company should be bound thereby.

But under the law such allegations do not constitute a defense. All communications and conversations leading up to a contract are merged therein and the terms of the contract, where they are unambiguous, cannot be varied by such matters. *The contract, as written, is between the plaintiffs and Java Pacific Line,* and prior communications, oral or written, will not be admitted for the purpose of showing that some third person, and not the plaintiffs, was in fact the person who assumed the burden of the contract, and was entitled to the benefits thereof.

Whatever may be the rule as to the right of an undisclosed principal to claim the benefits of a contract made in the name of his agent or the right of the adverse party to hold such undisclosed principal bound in case of such a contract, *no such rule applies in a case where the alleged principal was known at the time the contract was made.* If the person claimed to be the principal was known to the parties, but nevertheless the contract was made in the name of the alleged agent, parol or extrinsic evidence cannot be received to bind the alleged principal or to defeat the right of the person in whose name the contract was made.

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In *Ferguson* v. *McBean,* et al., 91 Cal. 63, 72, the Supreme Court of California said:

> "It is undoubtedly true that when the principal is undisclosed he may sue or be sued, *but not when he is known, and especially not when he is present at the making of the contract.*
>
> For a full and able discussion of the whole subject see Chandler v. Coe, 54 N. H. 561, and

Gillig v. Road Co., 2 Nev. 216, and cases therein cited.

Considered independent of authority, we think sound policy requires the enforcement, in cases such as these, *of the general rule that a writing cannot be varied by parol. It is as important to know who has made a contract as to know its terms; and when the parties put it in writing, there is no more reason or excuse for omitting the name of a known party, whom it is the intention to bind, than there is for omitting its most important stipulation.* To allow such a practice opens the door, in every case, to such conflicts of evidence as this case illustrates upon a point which can be easily and forever set at rest by simply making the written evidence of the contract conform to the mutual understanding of the parties as to matters fully within their knowledge."

Ferguson v. *McBean, supra,* was a bank case; all of the justices concurred in the decision.

In *Ferguson* v. *McBean, et al., supra,* the plaintiff sought to recover against two defendants, McBean and Bills. McBean appeared as a party to the written contract and the plaintiff insisted that Bills was also bound thereon as McBean's principal.

In support of its decision the Supreme Court of California cited *Chandler* v. *Coe,* 54 N. H. 561 and *Gillig* v. *Road Co.,* 2 Nev. 216.

Chandler v. *Coe, supra,* is a very well considered case where the court discussed and analyzed the authorities both in the United States and England. In that case the court said:

"We have already shown that there is no dif-

ficulty in sustaining an action upon an express verbal contract against or in favor of an unknown principal, while if the principal was known, it is to be presumed that he was the contracting party, unless it clearly appears that the agent contracted on his own account and that with knowledge of the facts the opposite party elected to look to the agent. Now, so far as the question of election is concerned, it is the same when the contract is verbal or written, except as the written contract may furnish evidence of an election to deal exclusively with the agent whose name was signed to it. *But does it not furnish conclusive evidence of such election? Is parol evidence admissible for the purpose of charging a principal upon a written contract made in the name of an agent?* In order to determine this question it may be useful to ascertain the reason for the rule of evidence to which we have referred, and whether it actually calls for the rejection of such testimony either in the case of a known or unknown principal, or both. The reason assigned by Lord Coke that 'it would be inconvenient that matters in writing made upon advice and on consideration and which fully import the certain truth of the parties should be controlled by averment of the parties to be preserved by the uncertain testimony of slippery memory'. Countess of Rutland's case, 5 Rep. 26a. In other words, the reason for the rule is that a written instrument furnishes the best evidence of the actual agreement: that it is more probable that the contract which the parties intended to make can be correctly ascertained from what was written than from the testimony of witnesses. But the party seeking to bring in an unknown principal starts by admitting the contract was written according to the agreement; that his intention was to look to the agent alone, just as he would admit his

intention was, if the contract had been merely verbal. How could he deny, whether the contract was verbal or written, that he intended to look to the agent, if he did not know that any principal existed? *The spirit of the rule therefore is not violated by giving him a right in the case of a written as in the case of a verbal contract to bring in the party who had the beneficial interest in the transaction;* and that is accomplished not by contradicting or varying the terms of the written instrument, but by applying and giving effect to the established rule of law.

But if the principal was known when the contract was made and signed the case is different. *If the party who received from an agent a written contract executed in the name of the agent, knowing that he acted for his principal, seeks to hold the principal, it must be upon the ground that it was intended to be and was received by him as the contract of the principal; because if he received it as the contract of the agent, knowing that he was an agent, that constitutes a conclusive election to look alone to the agent.*

Parol evidence, therefore, if admitted in such a case, does show that the contract that the parties intended to make *was not what the writing indicates but different. It shows that an error was committed in writing it. Its admission therefore allows 'the uncertain testimony of slippery memory' to come in and control what the parties have deliberately written and signed and this is inadmissible, because the writing furnishes the best evidence of the actual contract. . . . .Our conclusion, therefore, is that where there is a written contract, not under seal, executed in the name of an agent, parol evidence is admissible for the purpose of charging an unknown principal, but not for the purpose of charging a known one."*

In *Ford* v. *Williams,* 62 U. S. 287, 289 (21 How.) the Supreme Court of the United States said:

> *"If a party is informed that a person with whom he is dealing is merely the agent for another, and prefers to deal with the agent personally on his own credit, he will not be allowed afterwards to charge the principal;* but when he deals with the agent, without any disclosure of the fact of the agency, he may elect to treat the after-disclosed principal as the person with whom he contracted."

Ford v. *Williams, supra,* was cited by the Supreme Court of New Hampshire in *Chandler* v. *Coe,* 54 N. H. 561, *supra.*

The Pacific Coast Steel Company is not a party to the contract evidenced by the two letters of January 27th and February 12th. Any attempt to bind that Company under this contract, except upon the theory that it was an undisclosed principal must fail. There is no claim made in the answer that the Pacific Steel Company was an undisclosed principal. Nor in fact, as will hereafter be shown, is there any averment in the answer that the Steel Company was the disclosed principal. We are here assuming, however, for the sake of the argument, that the answer contains an allegation that the Steel Company was the disclosed principal. Upon such an assumption the alleged defense must fail.

If the principal is undisclosed he can sue and be sued on the contract made in his agent's name; but if the party knows that the person with whom he contracts is acting for an alleged principal, he cannot charge or be charged by that alleged principal, *for*

to permit that to be done would, as pointed out by the Supreme Court of California, supra, be a violation of the rule of substantive law that a written contract cannot be varied by parol.

The answer to the following question will determine who are the parties to the agreement evidenced by the letters of January 27th and February 12th: Could the Java-Pacific Line have held the Steel Company liable for the agreed price of the space in the event that no freight was shipped under the contract? If the Steel Company was the undisclosed principal of the plaintiffs it could have been held liable. But there is no claim made that the Steel Company was the undisclosed principal. If the Java-Pacific Line had sought to hold the Steel Company liable on this contract the obvious defense would have been that the Steel Company was not the undisclosed principal of the plaintiffs and that the Java Pacific Line entered into a contract with the plaintiffs although they knew (according to their claim) that the contract was intended to bind the Steel Company. *The very question as to who should be the party to the contract was presented to the Java Pacific Line and they entered into a contract with the plaintiffs and not with the Steel Company.*

If the Steel Company had been the undisclosed principal of plaintiffs the Java Pacific Line could have held either the plaintiffs or the Steel Company liable on the contract; but if the contract had been expressly made by plaintiffs as agents of the Steel Company, the Steel Company only, and not the plaintiffs, could have been held liable. The defendants contend that the Steel Company was liable on

the contract and *not the plaintiffs.* It is obvious that this contention is unsound, for it cannot be doubted that the plaintiffs would have been liable to pay the freight on the space reserved whether they shipped or not. If the plaintiffs had failed to ship or to pay the freight for the space reserved, and the Java Pacific Line had brought suit against them for the freight money due, could the plaintiffs here have defended on the ground that they were not liable on the contract? Would it have lain in their mouths to say: It is true the contract is made in our name but you knew we were acting for the Steel Company; therefore, the Steel Company is liable and we are not liable. The obvious answer to such contention would be: It may be true that in the negotiations and preliminary agreements leading up to the making of the final contract you stated that you were acting for the Steel Company, but when our agreement was finally put in writing you bound yourselves individually and did not bind the Steel Company. When an undisclosed principal is held on a contract made in his agent's name, the rule that parol evidence cannot be permitted to vary the terms of a written contract is not violated—such evidence cannot be received to discharge the agent, but only to add the undisclosed principal—the terms of the contract are not changed. But where the parties had before them for consideration the question as to whether a certain person (the alleged principal) should be made a party to a contract and purposely omitted to make him a party, evidence to show that it was intended to bind such person clearly violates the parol evidence rule, for as said by the Supreme Court of California in *Ferguson* v. *McBean, supra*: *"there is no more reason for omitting the name of a known*

party, whom it is the intention to bind, than for omitting its most important stipulation."

In *Cream City Glass Co.* v. *Friedlander,* 84 Wis. 53, 36 Am. St. Rep. 895, the defendant Friedlander, when sued on a contract of purchase and sale, entered into in his own name, defended on the ground that he was acting merely as a broker and that the plaintiff knew that he was so acting. In ruling that the testimony that the defendant was acting as a broker was properly ruled out, the Supreme Court of Wisconsin said:

> "The defendant claimed that he only acted as a broker between the plaintiff and the Liverpool firm for the sale of the soda ash in question, and upon the trial offered much testimony, *consisting of letters and telegrams which passed between himself and the plaintiff, and which led up to and finally culminated in the written contract of sale which is set forth in the statement of the case.* This testimony was offered for the purpose of showing that defendant acted simply as a broker, and that the contract should be construed simply as a broker's sold note. This testimony was all rejected by the trial court, upon the ground that it tended to vary and contradict the terms of a written contract. *This ruling was strictly right.* The contract which defendant executed, and under which the goods were delivered, was a plain and unambiguous contract of sale, and upon familiar rules previous negotiations could not change its legal effect. *There was nothing to prevent the defendant from making a contract binding himself personally if he chose to do so, notwithstanding his ordinary business may have been simply that of a broker, and notwithstanding also the fact that he may have preliminarily negotiated in the*

> *capacity of a broker in this very transaction.* Having made such a contract, he cannot now relieve himself from responsibility thereunder by showing that he was acting simply as agent or broker for a principal whether such principal was disclosed or undisclosed;"

In the case of an *undisclosed* principal the party is put to his election as to whether he will hold liable the agent in whose name the contract is made or the undisclosed principal; he cannot hold both liable. If he holds liable the person in whose name the contract is made after he obtains knowledge of the existence of the undisclosed principal he thereby releases the undisclosed principal and if he holds the undisclosed principal liable he thereby releases the person in whose name the contract is made.

The whole doctrine of the law in relation to an undisclosed principal is inapplicable to a case where a contract is made in the name of an agent acting for a *disclosed* principal. In the case of the undisclosed principal such principal is held because it will be presumed that it was he whom it was intended to bind and that if his existence had been disclosed the contract would have been made with him direct. The only reason that it was not so made is that his existence or identity was not disclosed. But where the existence and identity of the alleged principal are known to the parties, there can be no good reason (if it was intended to bind the alleged principal) why the contract was not made in his name or for his express benefit.

The rule putting the party to an election referred to above has no application where the al-

leged principal is disclosed, but the parties nevertheless enter into a contract to which he is not a party. In such a case the "election" is made when the contract is entered into.

The allegations in the answer violate two cardinal rules of law. These rules are:

> 1. Parol contemporaneous evidence will not be admitted to vary the terms of an agreement which the parties have reduced to writing.
> 2. All prior transactions, whether oral or written, are merged in a written agreement subsequently entered into and such prior transactions and agreements can be referred to only for the purpose of explaining as ambiguity in the subsequent written agreement, but cannot be referred to for the purpose of changing the terms or effect of such subsequent written agreement.

When the objectionable allegations of the answer are carefully examined it really cannot be said that the pleader intended to violate the first rule, as the answer does not allege that when the agreement of the parties was put in writing it was orally agreed or understood that the Pacific Coast Steel Company was the real party in interest. *It would seem that the pleader recognized that a written agreement between A and B could not be varied by showing by oral testimony that the parties really intended to bind C.* Realizing that such is the law, the defendants by the allegations objected to *have pleaded the erroneous legal conclusion that two letters which as a matter of law constitute a written agreement between the parties were "part and parcel of said transactions and correspondence preceding."* (Subdivision 5 of Paragraph I of Answer). *Defendants*

by their answer attempt to allege that a written contract was "part and parcel" of preceding correspondence, transactions and agreements. This is not an allegation of fact, but a mere conclusion of law, and it is a conclusion directly opposed to the second rule of law stated above.

As stated above the answer does not aver that in making the contract evidenced by the letters of January 27th and February 12th, the plaintiffs were agents of Pacific Coast Steel Company, nor does it allege that when the plaintiffs and defendants wrote the letters of January 27th and February 12th, they intended that the contract evidenced thereby should inure to the benefit of Pacific Coast Steel Company, or that it was intended that the Pacific Coast Steel Company was the person bound thereby. It is merely alleged that the letters were "part and parcel" of certain prior agreements alleged to have been made between Pacific Coast Steel Company and defendants. As a matter of law these two letters (which constitute a contract between the parties) could not be "part and parcel" of the alleged agreements referred to in subdivisions 1 to 4 of Paragraph I of the Answer. There is an entire absence of any allegation of any intention on the part of the plaintiffs and the defendants that the contract evidenced by the two letters should inure to the benefit of Pacific Coast Steel Company or that that company should be bound thereby. If the answer had contained such an allegation it would have been improper as the contract formed by the two letters pleaded in the complaint could not be so varied by parol or extrinsic evidence.

So much for the alleged defense contained in the

answer. The evidence which was admitted under this alleged defense and over plaintiffs' objections serves only to emphasize the fundamental error upon which the defendants based their defense to this action.

At the outset, it may be noted that the evidence was only admissible upon the theory that the allegations of subdivisions 1 to 5, both inclusive, of the answer constituted a defense, and if the court is convinced that the demurrer to this alleged defense should have been sustained, it will not be necessary to pass upon any other question presented on this writ of error.

The Letters Received in Evidence

The first letter offered in evidence appears at page 79 of the Record (Defendants' Exhibit "A"). It is dated December 2, 1915, and is from the defendants to the plaintiffs. It refers to an interview between the writer and J. W. Chapman, one of the plaintiffs, said to have been held on November 27th. The letter refers to a booking of 360 tons of steel for Pacific Coast Steel Company on the steamer "Arakan" scheduled to sail February 19, 1916. It also refers to an option to ship 750 tons, which option, the letter states, was to expire one week from November 27th. The letter requests the plaintiffs to confirm and also to advise in regard to the option.

The next letter, which appears at page 81 of the Record is from J. W. Chapman, one of the plaintiffs, to the defendants, and is dated December 3, 1915 (Defendants' Exhibit "B"). This letter states "We have booked firm 360 tons steel bars for account Pacific Coast Steel Company, destined Hong Kong

for shipment on S. S. Arakan, or substitute, scheduled to sail from San Francisco on or about February 19th, 1916, freight rate from San Francisco to Hong Kong $8.00 per ton of 2,000 pounds. The letter also refers to the option mentioned in defendants' letter of December 2nd.

The next letter which is from J. W. Chapman, one of the plaintiffs, to defendants, is dated December 9, 1915, and appears at page 82 of the Record (Defendants' Exhibit "C"). It refers to J. W. Chapman's letter of December 3rd and also to telephone conversation, and states that "we desire to book firm the 750 tons of space" covered by the option referred to in the two previous letters.

The next letter introduced in evidence, a copy of which appears at page 84 of the Record, is from the defendants to J. W. Chapman, and is dated December 10th. (Defendants' Exhibit "D".) This letter confirms booking of "750 tons of steel bars by our S. S. 'Arakan' * * * to Hong Kong or Manila, at a rate of 40 cents per 100 lbs., and to Java Ports of call at 50 cents per hundred lbs."

The next letter introduced in evidence, which appears at page 86 of the Record, is from Pacific Coast Steel Company to defendants, and is dated January 28th, 1916. (Defendants' Exhibit "E".) This letter confirms "booking for 1110 tons of 2000 pounds each of bar iron and steel, under 30 feet in length, for shipment from San Francisco to Hong Kong and Manila on S. S. 'Arakan' scheduled to sail February 19th and states that "This is in accordance with the booking made by Chapman and Thompson".

The five letters above mentioned were presumably introduced in evidence in support of the allegations of subdivision 1 of Paragraph I of the answer.

The next letter introduced in evidence, (page 88 of Record) is from J. W. Chapman to the defendants, and is dated December 24, 1915. (Defendants' Exhibit "F".) This letter "confirms conversation with your Mr. Edwards, wherein we have booked firm for account of the Pacific Coast Steel Company 300 tons bar iron, 20 feet and under in length, for shipment on your steamer 'Tjisondari' or substitute, to sail about March 23rd for Hong Kong or Manila, freight rate $10 per ton of 2000 lbs".

The next letter introduced in evidence (page 90 of Record) is from Pacific Coast Steel Company to defendants and is dated March 3, 1916. (Defendants' Exhibit "G".) This letter was written five days after the defendants repudiated the agreement between defendants and plaintiffs. This letter refers to "conversation during the recent visit of your Mr. Connor with regard to our letter of March 1st to Messrs. Chapman and Thompson" and refers the defendants to "letter dated December 24, 1915 from J. W. Chapman to your Company, booking for our account 400 tons of bar steel, 20 feet and under in length, for shipment on your steamer 'Tjisondari' scheduled to sail about March 23rd for Hong Kong and Manila." The letter states, "Under this letter we are entitled to ship this 400 tons in March", and also states that "our letter of March first to Chapman & Thompson does not refer to booking per the above mentioned letter of December 24th".

The next letter introduced in evidence (page 92

of Record) is from Pacific Coast Steel Company to plaintiffs, and is dated March 1st, 1916. (Defendants' Exhibit "H".) It is the letter referred to in the last mentioned letter from Pacific Coast Steel Company to defendants. It also was written after the repudiation of the contract by the defendants. It states:

> "We note your statement to the effect that the Java Pacific Line claims that your contract with them for space on their steamers sailing for Hong Kong and Manila is not a contract with you as principals, but only as agents for us. This claim is not founded in fact. Under our employment of you as traffic managers we expected that you would allow us to use such space as you had available and we desired, but the contract which you have with that line for space was not made by you as our agents and we are not your principals in the matter."

The three letters last mentioned were introduced in evidence in support of the allegations of subdivision 2 of Paragraph I of the answer.

The next letter introduced in evidence (page 94 of Record) is from J. W. Chapman to defendants, and is dated December 24th, 1915. This letter (Defendants Exhibit "I") reads as follows:

"Chapman and Thompson

San Francisco, Dec. 24th, 1915.

SUBJECT: Option account Pacific Coast Steel Company.

Messrs. J. D. Spreckels & Bros. Co.,
Agents, Java-Pacific Line,
Davis & California Sts.,
City.

Gentlemen:

This will confirm conversation with your Mr. Edwards, wherein you have given us option for space good until 5 P. M., December 28th, for 750 tons bar iron, 20 feet and under in length, for shipment from San Francisco to Hongkong or Manila on your steamer *"Karimoen,"* or substitute, scheduled to sail about April 22nd.

Any tonnage booked under this option to be at the rate prevailing for this steamer, and we trust you will quote us definite rate at your earliest convenience.

Please acknowledge receipt.

Yours very truly,
J. W. Chapman."

The next letter (page 95 of Record) is also dated December 24th, 1915, and is also from plaintiffs to defendants. (Defendants' Exhibit "J".) It refers to the other letter written on the same day and states, "We would like to have option for 250 tons additional bringing the total up to 1000 tons".

The next letter (page 96 of Record) is from the plaintiffs to defendants and is dated December 30, 1915. (Defendants' Exhibit "K".) It refers to "April space for account Pacific Coast Steel Company" and reads:

> "This will confirm conversation with your Mr. Edwards, wherein we have booked firm space for one thousand (1000) tons bar iron, twenty feet and under in length, for shipment from San Francisco to Hong Kong or Manila, on your Steamer *"Karimoen"* or substitute, scheduled to sail about April 22nd, rate to be at the prevailing rate for this steamer, which we understand will be announced by you about January 20th."

The three letters last mentioned were introduced in evidence in support of the allegations of subdision 3 of Paragraph I of the answer.

The next letter (page 97 of Record) is from plaintiffs to defendants and is dated December 24, 1915. (Defendants' Exhibit "L".) It refers to "option account Pacific Coast Steel Company for 1000 tons space for bar iron for shipment in May, 1916".

The next letter (page 99 of Record) is also from plaintiffs to defendants, and is dated December 30, 1915. (Defendants' Exhibit "M".) This letter also refers to the option mentioned in the last mentioned letter of December 24th.

The next letter (page 100 of Record) is also from plaintiffs to defendants and is dated January 10, 1916. (Defendants' Exhibit "N".) It confirms "conversation with your Mr. Edwards, wherein we have made firm booking for space for 1000 tons of bar steel, 20 feet and under in length, for account Pacific Coast Steel Co. for shipment on steamer 'Tjikebang' scheduled to sail about May 22nd".

The last three letters were introduced in evidence

in support of the allegations of subdivision 4 of Paragraph I of the answer.

The learned judge of the trial court took the view that the contract between the plaintiffs and the defendants was a "contract by correspondence" and that all the letters constituting the correspondence between the parties were a part of the contract.

Now we do not dispute the proposition that in a case where all the communications between the parties have been by correspondence all of the correspondence may be admissible in evidence. We seriously doubt, however, that even in such a case the legal effect of the contract formed by the two final letters can be changed by the prior correspondence.

But we do most earnestly maintain that where the prior negotiations and transactions have been partly by correspondence and partly oral, the prior correspondence cannot be permitted to change the terms or the legal effect of the agreement evidenced by the final letters, which on their face make a complete agreement.

The negotiations and transactions leading up to the two final letters of January 27 and February 12th were partly in writing and partly oral. *The letters introduced in evidence by the defendants are but fragments of these negotiations and transactions.* This is not a case where the negotiations leading up to the final contract and the final contract itself consist entirely of correspondence. The letters introduced in evidence by the defendants themselves show the existence of oral negotiations and transactions.

This is a contract by correspondence *but the two letters of January 27th and February 12th are the correspondence constituting the contract.* The prior letters are only a part of the communications between the parties preceding the two final letters. *In addition to the letters introduced in evidence by the defendants there were many oral communications, the existence of which is shown by the letters which defendants have introduced in evidence.*

If there had been no oral negotiations and the communications and transactions preceding the letters of January 27th and February 12th had been entirely by correspondence it might be said that all letters form part of the same contract and that nothing to the contrary appearing therein it would be presumed that the space reserved was for account of the Steel Company.

But here there may have been an oral understanding express or implied that the space should be for Chapman and Thompson the plaintiffs personally and that it was not reserved for the Steel Company.

The legal effect of the contract formed by the two last letters is that the space is reserved for Chapman and Thompson, the plaintiffs. When these two letters are considered by themselves there can be no question as to this. It appears that prior to the final consummation of the agreement evidenced by these two letters there were written and oral communications between the parties. *It is just as competent to prove the oral negotiations and communications as the written ones.* The written negotiations (letters) themselves refer to oral communications, understandings and agreements.

If these letters are admissible for the purpose of showing that the agreement finally consummated was not what it on its face purports to be, *then the oral negotiations and communications are admissible for the purpose of showing that the understanding was that the space was for Chapman and Thompson personally. It is apparent that the admission of the prior negotiations or communications whether oral or written, is directly contrary to the rule excluding extrinsic evidence.*

If the parties to this agreement had orally agreed that the space mentioned in the two last letters should be for the use of Chapman and Thompson and that the Steel Company should be eliminated what more apt words could they have used than they did in these two letters?

The whole matter may be summed up as follows: Is it not entirely possible that prior to the two last letters the plaintiffs and defendants orally agreed that the space should be reserved for the use of Chapman and Thompson? Is it not entirely possible notwithstanding an original intention, that the space should be reserved for the Steel Company, *that the parties changed their minds about this and orally agreed that the space should be reserved for Chapman and Thompson?*

If the foregoing questions can be answered in the affirmative then it necessarily follows that the question as to who is entitled to enforce the contract is concluded by the last two letters which in legal effect constitute a contract with Chapman and Thompson.

If these two letters stood alone it must be conceded that the party entitled to enforce the contract would Chapman and Thompson. *Can a part of the prior negotiations and communications between the parties be received to overcome this presumption? If so, evidence of other negotiations and communications should be received to sustain it. Hence the court would be trying the very matter which is concluded by the written agreement.*

It is wholly immaterial here whether or not the parties orally agreed that the space should be reserved for Chapman and Thompson personally. Such is the legal effect of the written agreement. *This agreement forecloses any inquiry as to what the oral agreement was.*

The defendants' contention was about as follows: The original correspondence between the parties shows that it was the intention that the space to be reserved should be for the account of the Steel Company; there is nothing in the letters introduced in evidence which shows that this intention was abandoned; hence construing all the letters together it appears that the space was reserved for the Steel Company.

An analysis of the transactions between the parties will show the inherent unsoundness of this contention. On their face the last two letters constitute a contract with Chapman and Thompson. Such is their legal effect. Doubtless when Chapman and Thompson first negotiated for space they intended

that it should be reserved for the Steel Company; the letters so indicate.

But the letters are not all the communications between the parties. The last letter which makes any reference to the Steel Company is the letter of Chapman and Thompson to defendants' agents dated January 10, 1916. (Page 100 of Record.) *A letter from defendants dated January 22, 1916, states that the space is reserved "in your name". Neither this letter nor the two letters containing the final agreement of the parties make any reference to the Steel Company.*

The letter of January 22, 1916, from defendants to plaintiffs (page 115 of Record) was not introduced in evidence by the defendants. Of all the communications between the parties antedating the two letters of January 27th and February 12th, this letter was the most significant as showing the intention of the parties at the time that the letters of January 27th and February 12th were written. Yet the plaintiffs had to introduce it in evidence in rebuttal. This letter reads as follows:

Java-Pacific Line

San Francisco, Jan. 22, 1916.

Messrs. Chapman & Thompson,
Fife Bldg.,
San Francisco.

Gentlemen:

Confirming conversation with your Mr.

Chapman on January 21st, wish to advise that our books shows reservations *in your name* as follows:

February	360	tons	weight
February	750	"	"
March	1000	"	"
April	1000	"	"
May	1000	"	"
June	1000	"	"

Trusting that this is the information you desire and that you will find same agrees with your records, we are,

Yours very truly,

J. D. Spreckels & Bros. Company,
General Agents,
Fred F. Connor,
Traffic Manager."
(Record p. 115.)

Defendants' letter of January 22nd purports to be in confirmation of a conversation between Mr. Connor and J. W. Chapman held on January 21st.

The whole contention of defendants is conclusively disposed of by the answer to the following question: *Is it not entirely possible that between January 10th and January 27th or between January 10th and February 12th the parties orally agreed (expressly or impliedly) that the space to be reserved on the steamers should be reserved for Chapman and Thompson and not for the Steel Company? An affirmative answer to this question is a complete refutation of the contention of defendants.*

Not only with reference to the persons for whom the space was to be reserved, but with reference to

nearly every other term, the contract, as evidenced by the two letters of January 27th and February 12th differs from the prior agreements referred to in the letters introduced in evidence.

With relation to space for February shipment: The letter of December 3, 1915, from J. W. Chapman to defendants (page 81 Record) covers "steel bars * * * * freight rate $8.00 per ton". The letter of December 9th (page 82 of Record) covers "steel bars * * * * freight rate from San Francisco to Hong Kong and Manila $8.00 per ton, and to Java ports of call $10.00 per ton".

The letters of January 27th and February 12th contain the following terms:

> "Rate $8.00 per ton of 2,000 pounds for bar iron under 30 feet in length, plate iron and structural steel, no piece to exceed 4,000 pounds in weight, $10.00 per ton of 2,000 pounds to Hong Kong and Manila". (Letter of January 27, 1916, Record p. 3.)

The agreement referred to in the letters of December 3rd and December 9th covered only "steel bars". The contract evidenced by the letters of January 27th and February 12th covered "bar iron and plate iron and structural steel". The agreement referred to in the letters of December 3rd and December 9th provided for but one rate to Hong Kong or Manila, viz. a rate of $8.00 per ton on bar iron, whereas in the letters of January 27th and February 12th, two rates are mentioned, one of $8.00 per ton on bar iron under 30 feet in length, and one of $10.00 per

ton on plate iron and structural steel. The letters of December 3rd and December 9th refer to a rate of $10.00 per ton to Java ports of call, whereas the two letters of January 27th and February 12th do not provide for rates to any points but Hong Kong and Manila.

With relation to space for March shipment: The letter of December 24th, 1915 (page 88 of Record), from J. W. Chapman to defendants relates to

> "bar steel 20 feet and under in length"

and states that the rate thereon is $10.00 per ton of 2000 pounds.

The letters of January 27th and February 12th provide:

> "rate $10.00 per ton of 2000 pounds for bar iron under 30 feet in length, plate iron and structural steel, no piece to exceed 4000 pounds in weight, $12.00 per ton of 2000 pounds to Hong Kong and Manila." (Record p. 3).

It will be seen that the letter of December 24th relates to bar steel 20 feet and under in length. whereas the letters of January 27th and February 12th relate to bar iron 30 feet and under in length. The letter of December 24th makes no reference to plate iron and structural steel, whereas the letters of January 27th and February 12th do cover these commodities and specify a rate thereon of $12.00 per ton.

With reference to April shipment: The letter of December 30, 1915 (Defendants' Exhibit "K", page 96 of Record), refers to

> "bar iron, twenty feet and under in length," and states that the rate is "to be at the prevailing rate for this steamer, which we understand will be announced by you about January 20th".

The letters of January 27th and February 12th provide as follows:

> "April shipment, 1000 weight tons, rate $25.00 per ton of 2000 pounds for bar iron under 30 feet in length, plate iron and structural steel, no piece to exceed 4000 pounds in weight, $30.00 per ton of 2000 pounds to Hong Kong and Manila." (Record p. 3.)

The letter of December 30th relates only to bar iron twenty feet and under in length, whereas the letters of January 27th and February 12th relate to "bar iron under 30 feet in length". The letter of December 30th makes no reference to any commodity but bar iron, whereas the letters of January 27th and February 12th cover also plate iron and structural steel. The letter of December 30th mentions no rate, whereas the letters of January 27th and February 12th specify the rates to be charged on the various commodities therein mentioned.

In other words, the prior correspondence relating to March and April shipments all refers only to bar iron under 20 feet in length, and makes no mention of plate iron or structural steel, whereas the

contract formed by the letters of January 27th and February 12th refers to bar iron 30 feet in length, or under, and fixes a rate for plate iron and structural steel.

Moreover, the correspondence relating to April shipment fixes no rate.

It is evident from a perusal of the letters of January 27th and February 12th that they were intended to be the complete and final definition of all the terms of the contract. This is apparent not only from an inspection of those letters but from an examination of the preceding correspondence.

Surely none of the preceding correspondence is admissible to so vary the terms of the letters of January 27th and February 12th as to limit the lengths of iron bars to 20 feet or under, or to change the rate of the April shipment, or to modify the stipulation in the letters of January 27th and February 12th relating to plate iron and structural steel, or as to the rates to be charged on those particular commodities.

The prior correspondence was introduced solely for the purpose of altering the contract formed by the letters of January 27th and February 12th with respect to the persons for whom the space was to be reserved.

Between the initiation of the correspondence and the two letters of January 27th and February 12th, practically every other term of the agreement between the parties was changed. *Why was it not also competent for the parties to provide by their final agreement that the space should be reserved for*

Chapman and Thompson and not for the Steel Company?

There is nothing in the correspondence to show why or when any other terms of the agreements between the parties were changed. There is nothing in the corrspondence to show when or why the maximum length of the iron bars was changed from twenty to thirty feet; there is nothing in the correspondence to show when or why plate iron and structural steel were added to the commodities which could be shipped in the space reserved; and there is nothing in the prior correspondence to show when or how the rates for April shipment were fixed.

Why, then, should it be assumed that the parties did not as a result of their oral negotiations purposely agree that the contract should be between Chapman and Thompson on one side, and the defendants on the other, instead of between the Pacific Coast Steel Company and the defendants?

And if the parties did orally agree that the space should be reserved for Chapman and Thompson, what more apt language could have evidenced their intent than the language employed in the two letters of January 27th and February 12th.

As already pointed out, the prior correspondence itself actually evidences this changed intent of the parties. The letter of February 22nd (p. 115 Record) *which was introduced in evidence by the plaintiffs and not by the defendants,* makes no mention of the Pacific Coast Steel Company and specifically states that the reservation is *"in your name"*.

The letters of January 27th and February 12th constitute, in themselves, a complete contract binding Chapman and Thompson to pay for the space reserved thereby, at the rates specified, whether they used it or not. Chapman and Thompson were bound by the contract. Why is not the Java Pacific Line also bound thereby?

When the parties entered into the contract evidenced by these two letters, they were deemed, in the language of the authorities, *to have contracted as well with reference to the legal effect of the language which they employed, as with reference to the language itself.* It follows that by these two letters the defendants agreed to reserve for Chapman and Thompson certain space for certain commodities at certain specified rates, and that Chapman and Thompson agreed to pay for the space reserved at the rates specified. Such was the legal effect of the agreement evidenced by these two letters. The purpose of the introduction of the prior correspondence was to vary the legal effect of the contract as finally and definitely expressed by the parties.

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Under the authorities a contract, complete in itself, can no more be varied by proof of prior writings than by proof of prior oral communications or negotiations.

In *Cream City Glass Company* v. *Friedlander,* 84 Wis. 53 (36 Am. Rep. 895), cited and quoted from as above, plaintiff sold to defendant certain carbonated soda ash, which, upon delivery, the defendant rejected for alleged defects therein. The defendant claimed that he acted as a broker in the transaction

and offered to introduce certain telegrams and letters between himself and plaintiff which preceded the memorandum of sale constituting the contract. The testimony was rejected by the trial court on the ground that it tended to vary the terms of the written contract.

Creamery Package Mfg. Co. v. *Duncan,* 119 S. W. 33 (Mo.) was an action to recover the balance alleged to be due on the purchase price of a boiler. The defendants, by a written order, dated May 2nd, 1905, had purchased a boiler from plaintiffs upon certain terms stated in the order. Shortly afterward, finding the boiler too small, defendants began corresponding with plaintiffs about the purchase of a larger boiler at a higher price. On June 21st, 1905, defendants, in replying to a letter of plaintiffs, agreed to buy the larger boiler, upon certain terms stated in their letter of June 21st. In their letter of June 21st defendants said: "This means the cancellation of the other contract."

On the following day, June 22nd, they sent a more definite order for the larger boiler to plaintiffs, in which they said nothing about the cancellation of the contract for the smaller boiler. This order was accepted by plaintiffs, the larger boiler was delivered, and defendants returned the smaller boiler, for which they received a credit of $60.00. Afterward defendants paid plaintiffs $140.00, the remainder of the purchase price of the larger boiler.

In this action the plaintiffs sought to recover the balance of the purchase price of the smaller boiler.

Defendants alleged that as part of the contract of the sale of the larger boiler, it was agreed that the balance due on the purchase price of the smaller boiler should be cancelled, and they referred to their letter of June 21st.

The court said:

> "The second contract (that is, the order of June 22nd) is in writing, is unambiguous, and it fails to show an intention to release the obligation of defendants under the first contract. *It is true the letter written by defendants on the preceding day expressed such intention on their part, but that letter, as well as the remainder of the correspondence, was merged in the written contract, subsequently executed, and cannot be employed to contradict or vary the terms of their contract, which, as we have said, are free from ambiguity and appear to cover the whole transaction of the sale of the second boiler. The interpretation of written contracts of such character is a matter of law for the court, not an issue of fact for the jury.*"

Union Selling Company v. *Jones,* 128 Fed. 672, (C. C. of A.) was an action to recover the purchase price of twine sold to the defendant. In a letter from the plaintiff to Jones, dated March 7th, the plaintiff quoted prices for twine, and said: "We have no doubt that the quality of the twine which we can furnish will be entirely satisfactory to you and your customers."

On June 6, 1900, the plaintiff and Jones entered

into a contract for the sale of certain twine to Jones, and this contract provided "Quality guaranteed".

Jones' defense to the action was that the quality of twine was not satisfactory to him or his customers.

The court said (quoting from Thompson v. Libby, 34 Minn. 374, 26 N. W. 1):

> "The only criterion of the completeness of a written contract as a full expression of the agreement of the parties is the writing itself. If it imports on its face to be a complete expression of the whole agreement—that is, contains such language as imports a complete legal obligation —it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed. The rule forbids to add by parol where the writing is silent, as well as to vary where it speaks (citing cases). And the law controlling the operation of a written contract becomes a part of it and cannot be varied by parol any more than what is written," (citing many cases, including several decisions of the United States Supreme Court).

At page 676 the court said:

> "The law controlling the operation of a contract is deemed to be, and usually is, actually within the contemplation and intention of the parties as much as the words in which it is expressed and becomes equally an assential part of it (citing cases). For this reason the rule that a written contract cannot be varied by parol

> extends to legal import or intendment of the contract, as well as terms or words in which it is written (citing cases)."

In discussing the particular facts of the case, the court, at pages 677 and 678 said:

> "It is not certain that there is any difficulty in understanding its language or effect, when the face of the contract alone is considered, but, read in the light of these surrounding circumstances which were competently proven, the meaning of the words employed and intention of parties are clear and there is no doubt that the agreement is completely expressed * * * * The effect of permitting plaintiff to prove antecedent negotiations was to establish a standard for determining whether warranty had been satisfied, and the extent of any departure therefrom, which was different from the standard which the parties had established for themselves by their final agreement expressed in writing. This was error."

The cases of *Ferguson* v. *McBean,* 91 Cal. 63, 72, *Chandler* v. *Coe,* 54 N. H. 561 and *Ford* v. *Williams,* 62 U. S. 287, 289 (21 How.), are cited and quoted from *supra.*

See also:

Rough v. *Breitung,* 75 N. W. 149.
Osgood v. *Bauder,* 47 N. W. 1001, 1003 (Ia.).
Delamater v. *Chappell,* 48 Md. 244.
Chambers v. *Brown,* 28 N. W. 563 (Ia.).
Robinson Machine Works v. *Chandler,* 56 Ind. 575, 579.
Shankland v. *City of* Washington, 30 U. S. 393.
Ottumwa Mill v. *Manchester,* 115 N. W. 911, 912.

Johnson v. *Bibb Lumber Co.,* 140 Cal. 95, 98.
Empire Investment Co. v. *Mort,* 169 Cal. 738, 739.
Davis v. *Fidelity Ins. Co.,* 70 N. E. 359 (Ill.).
Reif v. *Commercial Cabinet Co.,* 185 Ill. App. 577.

The rule of law excludes not only prior oral communications, but also prior written communications. In California this rule is statutory (Sec. 1625, *Civil Code*). Professor Wigmore (1 *Greenleaf on Evidence,* Sec. 305a, subd. 2) states the law as follows:

> "It is next to be noted that the thing that is to be excluded as immaterial by the rule is not particularly anything that can clearly be described as 'parol'. Without attempting to discriminate the various possible senses of the word, it will be enough to note that, so far as it conveys the impression that what is excluded is excluded because it is oral—because somebody spoke or did something not in writing, or is now offering to testify orally—this impression is not the correct one. When the rule is applicable what is excluded may be written material as well as conversations, circumstances and oral matter in general. * * * * So that the term 'parol' affords no necessary clue to the kind of material excluded; and it conduces to the intelligent use of the rule to dismiss any notion that oral or parol matters are inherently the object of its prohibition."

The rule excluding prior oral and written negotiations and transactions is not merely a rule of evidence, but a rule of substantive law:

> 5 *Chamberlayne's Modern Law of Evidence,* pg. 4908.

1 *Greenleaf on Evidence,* Sec. 305a, subd. 1 (16th Ed.).
Dollar v. *International Banking Corporation,* 13 Cal. App. 331, 343; 109 Pac. 499, 504.

The rule applies as well to terms necessarily implied or read into the contract by law as to those expressly stated:

U. S. v. *Fidelity Co.,* 152 Fed. 599 (C. C. of A.).
Atwood v. *Little Bonanza,* 13 Cal. App. 594, 596; 110 Pac. 344.

It is for the court to determine whether correspondence between parties amounts to a contract:

Wristen v. *Bowles,* 82 Cal. 84.
Luckhardt v. *Ogden,* 30 Cal. 547.

At the trial the defendants cited but one case, viz., *Georgia Railroad & Banking Co.* v. *Smith,* 10 S. E. 235 (Ga.). This was an action on behalf of the state by Smith, its governor, to recover from Georgia Railroad & Banking Company money paid to that company by the Western & Atlantic Railroad which was owned and operated by the state. The state owned road and the defendant road were operated as a continuous line. The money sued for had been paid by the state road to the defendant road as the defendant's share of certain freight charges for shipments moving over both roads, the state road having collected the total charges from the consignee. The state road assumed the position that the consignee had been charged in excess of the rate to which he was entitled under a special contract made with him by the state road on

behalf of the state road and the defendant road. On this assumption the state road had refunded the overcharge to the consignee and brought this action to recover the excess paid the defendant road on the division of rates made between the two roads.

The defendant road contended that the contract made by the state road with the consignee on behalf of both roads, was limited to a certain portion of the year, and that after the expiration of this time the consignee was no longer entitled to the special rate.

The question involved in the case was what contract the defendant road had authorized the state road to make on its behalf. Permission to make a special contract on behalf of both roads was asked of the defendant road by the state road. Several telegrams passed between the two roads regarding the terms of the proposed contract with the consignee. The dispatches from the state road were lost, but the dispatch from the defendant road authorizing the contract with the consignee was introduced in evidence. The alleged terms of the lost dispatches were supplied by parol evidence. Judgment in the trial court went in favor of the state. On writ of error the judgment was reversed upon the ground that the court erred in not properly instructing the jury.

Several letters and telegrams were sent by the defendant road to the state road which were silent as to the time during which the special contract rate was to continue. One of these was the telegram authorizing the state road to close the contract. The defendant road requested the court to instruct the jury as follows:

> "if the contract be alleged to have occurred by letter or telegram, and if, in any or either of the communications on the subject, the limitation or condition was inserted it would not be necessary to repeat or again refer to such condition or limitation in every subsequent letter between the parties in order to preserve its force. If the alleged condition or limitation existed, and was so understood between the parties in point of fact, it should be regarded and enforced as part of the contract, whether again repeated or alluded to in other or subsequent letters or telegrams or not."

The trial court refused to so instruct the jury, and in holding that this was error, the Supreme Court of Georgia said:

> "Several telegrams and one or more letters touching the contract in question were sent by the superintendent of the Georgia Railroad which were silent as to any time element. One of these was the telegram above referred to, giving authority and instructions to close the contract. The silence of all of these documents upon the element of time is strongly suggestive of the theory that in the contemplation of the writers time was not of the essence of the agreement between the two roads; yet it is true, as the request to charge lays it down, that, if in any or either of the communications on the subject a limitation or condition was inserted, it would not be necessary to repeat or again refer to such limitation or condition in every subsequent letter between the parties, in order to preserve its force. Thus, if in the lost telegrams, or any of them, from the state road to the Georgia road, the condition or limitation was inserted, and in point of fact the authorities of the two roads understood the limitation or condition as form-

ing a part of the contemplated contract, the silence of any or all the subsequent communications on the subject would not displace or defeat the time element; in other words, the silence of the subsequent communications could be regarded by the jury as tending to show what sort of a contract the Georgia road authorized the state road to make in its behalf; but the jury could not rightfully treat such silence as defeating the condition or limitation, which, by an agreement of the two roads, was to be part of the terms of the contract that one of these authorized the other to make with the consignee."

Argument is unnecessary to show that this decision is not authority in support of the defendants' contention in the case at bar. The case is not authority here for the following reasons:

1. In the case cited all of the communications between the parties were by letter or telegram —there were no oral communications. In the case at bar there were many oral communications between the parties in addition to the letters which the defendants introduced in evidence.

2. The last telegram from the Georgia road to the state road did not purport to state the terms of the proposed agreement with the consignee. It merely authorized the state road to close the contract referred to in the previous telegrams. In the case at bar the two letters of January 27th and February 12th constitute a complete contract between the parties.

It may be further noted that in *Georgia Railroad & Banking Co.* v. *Smith, supra,* neither the rule against permitting parol or extrinsic evidence to

vary the terms or legal effect of a contract between the parties, nor the rule that prior negotiations and transactions are merged in the final contract, were in any manner involved. This is so not only for the reason that there was not (as there is in the case at bar) any letter or telegram purporting to state the terms of an agreement between the parties, but also because no contract of any kind between the state road and the defendant road was involved. No controversy was involved as to the terms of any agreement between the parties to the action. The question involved was merely one as to what authority was conferred upon an agent by his principal. The state road in making the contract was acting as the agent of the defendant road.

In citing this case, defendants' counsel stated that in the case at bar, it was not necessary "to repeat in the subsequent correspondence between the parties the statement that the space was to be reserved for the account of the Pacific Coast Steel Company".

Even if all of the communications between the parties in the case at bar had been by letter, and the first letter, like the first letters introduced in evidence here, had stated that the space was for the account of the Pacific Coast Steel Company, and the final letters had made no mention as to the person for whom the space was to be reserved, and these final letters had purported (as did the letters of January 27th and February 12th) to state all the terms of the agreement between the parties, we would most certainly maintain that the terms and legal effect of these last two letters could not be varied by a statement made in the prior letters that the space was to

be reserved for the Steel Company.

But, as we have seen, the case here is very different from a case where all of the communications had been in writing. Here there were numerous oral communications. The letters antedating the two letters of January 27th and February 12th are but a part of the communications between the parties. Not only with reference to the person for whom the space was to be reserved, but with reference to almost every other term, the agreement formed by the two letters of January 27th and February 12th is different from any of the agreements referred to in the prior correspondence, and there is nothing in this prior correspondence to indicate how or when the changes were agreed upon. The prior correspondence itself refers to contemporaneous oral communications between the parties. As pointed out *supra,* it is entirely possible that between January 10th, 1916, the date of the last letter making any mention of the Pacific Coast Steel Company, and January 27th, or between January 10th and February 12th (the date of the letter from the defendants confirming the terms stated in plaintiffs' letter of January 27th) it was orally agreed that the space should be reserved for Chapman & Thompson. In any event, it must be conclusively presumed that such oral agreement was made, as that is the legal effect of the agreement formed by the two letters of January 27th and February 12th.

That the fact conclusively presumed from the agreement of the parties was really the fact, is shown by the letter of January 22nd from defendants to plaintiffs, wherein it is stated that the space is reserved *"in your name".* (Record pg. 115.)

If, in the case at bar, the parties had intended to eliminate the term of the preceding agreements to the effect that the space was for the account of the Steel Company, how could they have evidenced such intent more clearly than they did in the two letters of January 27th and February 12th?

In the letter of January 27th Chapman & Thompson might have stated that the space was to be reserved for them and not for the Pacific Coast Steel Company. But if the letters had contained such a statement, the legal effect of the agreement would not have been different from the legal effect of the agreement formed by the two letters actually written.

The action of the court in instructing the jury to find for the defendants need not be referred to at length. As stated above, this instruction was given upon the assumption that subdivisions 1 to 5 of Paragraph I of the answer stated a valid defense and that the prior correspondence was properly admitted.

It may be further noted, that even if the court had not erred in overruling plaintiffs' demurrer to subdivisions 1 to 7 of Paragraph I of the answer and in admitting in evidence the correspondence had between the parties prior to January 27th, 1916, error was nevertheless committed by instructing the jury to find for the defendants.

This prior correspondence was admitted in evidence for the purpose of showing that the space stipulated for in the letters of January 27th and February 12th was reserved for the account of the Pa-

cific Coast Steel Company, the theory upon which it was admitted being that it showed an intent that the space was reserved for that company. As showing the intent of the parties, it stood on no different foundation than oral communications between the parties stood. The correspondence itself showed the existence of contemporaneous oral communications. If these letters were admissible for that purpose, so likewise were oral communications.

At the trial the plaintiffs accepted, under constraint, the defendants' theory of the case and offered oral testimony to show that the space was intended to be reserved for Chapman & Thompson. When this testimony was offered, plaintiffs' counsel said: "I object to that; I do not see that there are any conversations admissible here; there is a written contract pleaded in the complaint." (Record, p. 117.)

J. W. Chapman, one of the plaintiffs, testified that on January 15th he called at the office of the defendants' agents and in the course of a conversation with Mr. Edwards (one of the defendants' representatives) said: "You understand that all of these bookings are for Chapman & Thompson". Mr. Edwards replied, "Yes", and showed Mr. Chapman the book. (Record, pp. 119-120.)

J. W. Chapman also testified that about January 20, 1916, he had a conversation over the telephone with F. F. Connor (also one of defendants' representatives). Mr. Chapman testified that Mr. Connor inquired who would ship the 1110 tons on the February steamer, to which inquiry Mr. Chapman re-

plied that it would be shipped by the Pacific Coast Steel Company. Mr. Connor then requested a letter direct from the Pacific Coast Steel Company to the Java-Pacific Line confirming the booking and stating that they would ship. (Record p. 120.)

J. W. Chapman further testified that on January 21st, Mr. Edwards called at the office of Chapman & Thompson and that at this time he (Chapman) requested Edwards "to furnish me a list of all of the bookings and reservations for Chapman & Thompson", and that at the same time he again said to Mr. Edwards, "You understand that these bookings are all for Chapman & Thompson"? (Record pp. 120-121.)

J. W. Chapman also testified that on or about February 10th he had a conversation with Mr. Connor on the floor of the Merchants' Exchange. At this conversation Mr. Connor asked the witness who would ship the freight on the bookings made by Chapman and Thompson to which question the witness replied that Chapman & Thompson were booking cargo for several local firms. Mr. Connor replied that he desired to be furnished with letters direct from the parties who would actually ship the freight a short time prior to the sailing of the steamship. (Record, pp. 121-122.)

J. W. Chapman also testified that Mr. Connor said that he would much prefer if he could take some measurement cargo or light bulk, as the iron and steel which Chapman & Thompson had on his steamers took so much longer to load than the light and bulky freight. (Record, pp. 123-124.)

Furthermore, the letter of January 22, 1916, from the defendants to the plaintiffs (plaintiffs' Exhibit No. 4, Record p. 115) states that the space is reserved "in your name".

It is, of course, inconceivable, under the law, that any of these communications, whether oral or written, were properly admissible in evidence to change the terms or legal effect of the contract formed by the two letters of January 27th and February 12th. It is inconceivable that, in view of the written agreement between the parties, there could be an issue of fact such as is suggested by these oral and written communications. The very purpose of the law is to foreclose any such inquiry.

But if such an inquiry were permitted, the evidence in the case was at least conflicting, and the issue should have been submitted to the jury. In view of the letter of January 22nd from defendants to plaintiffs, we cannot see how the evidence could even be said to be conflicting.

In the only case cited by defendants, at the trial, *viz. Georgia Railroad & Banking Co.* v. *Smith,* 10 S. E. 235, 236, *supra,* the court said:

> "The silence of all of these documents upon the element of time is strongly suggestive of the theory that in the contemplation of the writers time was not of the essence of the agreement between the two roads."

So in the case at bar, if any such inquiry were permitted, the fact that the two letters of January 27th and February 12th made no reference to the Pacific

Coast Steel Company, would have been sufficient to entitle the plaintiffs to have the jury pass on the question. But added to that fact, we have in this case the letter of January 22nd, from defendants stating that the space is reserved "in your name", and the testimony of J. W. Chapman referred to above.

It is submitted that the judgment should be reversed for the errors of the court in overruling plaintiffs' demurrer to subdivisions 1 to 7 of Paragraph I of the answer, in admitting in evidence the correspondence prior to January 27th and in instructing the jury to find a verdict for the defendants.

The other errors assigned need not be referred to in detail. We are confident that the judgment of the District Court will be reversed for the reasons above stated. At a new trial, after a reversal for these reasons, it is very improbable that the questions involved in the other specifications of error will again arise, as the rulings of the court there involved were all based upon the assumption that subdivisions 1 to 7 of Paragraph I of the answer alleged a valid defense and upon the assumption that the correspondence preceding the letters of January 27th and February 12th was admissible in evidence.

It is respectfully submitted that the judgment of the District Court should be reversed.

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